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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 731

ALABAMA STATE TEACHERS ASSOCIATION, *et al.*,

Appellants,

—v.—

ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Middle District of Alabama, entered on July 26, 1968, denying declaratory and injunctive relief, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the court below is as yet unreported and is set forth as Appendix A, pp. 1a-13a, *infra*.

Jurisdiction

This is a civil action brought pursuant to 28 U.S.C. §§1343 and 1331, and 42 U.S.C. §1983, for declaratory and injunctive relief against the operation of Ala. Acts, Reg. Sess. 1967, No. 403 [hereinafter cited as Act No. 403].

Appellants sought to restrain the enforcement of Act No. 403 on the grounds that it violated their rights under the Equal Protection Clause by failing to encourage disestablishment of the dual system of racially segregated public colleges in Alabama.

The judgment of the United States District Court for the Middle District of Alabama denying an injunction was entered July 26, 1968 (R. 695; App. pp. 1a-13a, *infra*). Notice of appeal to this Court was filed in the district court September 13, 1968 (R. 935).[1]

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1253 to review the judgment of the district court of three judges necessarily convened pursuant to 28 U.S.C. §2281. Appellants in this case sought declaratory and injunctive relief against the operation of Act No. 403, which authorizes the Alabama Public School and College Authority to issue and sell bonds in the principal amount of $5,000,000 for the purpose of establishing a 4-year college at Montgomery under the supervision and control of Auburn University.[2] A three-judge court was properly convened under 28 U.S.C. §2281 because this is an action seeking to restrain state officials from enforcing a state statute on the ground that it is unconstitutional because it defines and effectuates a state policy of constructing facilities for higher education without regard to the para-

[1] Notice of appeal to the United States Court of Appeals for the Fifth Circuit was filed August 23, 1968; and a motion to hold the appeal in abeyance pending disposition of the appeal in this Court was filed October 25, 1968, and granted November 5, 1968.

[2] The formation of the Alabama Public School and College Authority was authorized by Ala. Acts, 1st Spec. Sess. 1965, No. 243 [hereinafter cited as Act No. 243] which gave the Authority, a public corporation, the power among others,

> to provide for the construction, reconstruction, alteration and improvement of public buildings and other facilities for public educational purposes in the State, including the procurement of sites and equipment therefor. (R. 8)

mount federal obligation to disestablish the dual system based upon race. See, *e.g., Flast* v. *Cohen,* 392 U.S. 83 (1968), *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962), *Query* v. *United States,* 316 U.S. 486 (1942). This is not, therefore, merely an attack upon the "unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." *Cf. Ex parte Bransford,* 310 U.S. 354, 361 (1940) (dictum). Nor is it a matter of purely local concern, because here relief is sought against the action of state agents, acting under a state statute expressing the state's policy in relation to a new segment of the statewide system of public colleges. See, *e.g., Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935); *Sailors* v. *Board of Educ. of the County of Kent,* 387 U.S. 105 (1967).

Statute Involved

The statute involved in this case is Ala. Acts, Reg. Sess. 1967, No. 403, the complete text of which follows:

AN ACT

To authorize the Alabama public school and college authority, a public corporation, to issue and sell additional bonds in the principal amount of $5,000,000 for the purpose of constructing, equipping, establishing, creating, supporting and maintaining a four-year college at Montgomery under the supervision and control of the board of trustees of Auburn University.

Be It Enacted by the Legislature of Alabama:

Section 1. The Alabama public school and college authority created and established under the provisions of Act No. 243, H. 29, approved May 4, 1965 (Acts, First Special Session 1965, p. 331) is hereby authorized to issue and sell its bonds in the principal amount of $5,000,000 in addition to all other bonds heretofore

issued or heretofore authorized to be issued by said authority. All bonds sold under authority of this Act shall be issued, secured by, and the principal and interest amortized and paid in the same manner and from the same funds as prescribed in said Act No. 243 of the First Special Session of 1965 with respect to bonds previously issued by the authority. Proceeds of the sale of such bonds shall be deposited, and disbursed for the sole purpose herein provided, and all work undertaken hereunder, and all contracts let hereunder shall be supervised and shall be in all other respects governed by the provisions of said Act No. 243 of 1965.

Section 2. The proceeds of all bonds issued and sold by the authority under this Act remaining after paying expenses of their issuance shall be deposited in the state treasury, and shall be carried in the state treasury in a special or separate account. The net proceeds derived from sale of the bonds shall be distributed to Auburn University to be used by the board of trustees thereof for construction and equipment of physical facilities for conducting a four-year college or branch of the University in the City of Montgomery and for the support and maintenance of such college for each of the fiscal years ending September 30, 1968 and September 30, 1969.

Questions Presented

1. Does the State have an affirmative duty to disestablish a dual system of higher education based upon race?

2. Where the record shows that the proposed construction by a predominantly white university of a college in Montgomery duplicating an existing, virtually all-Negro college, was planned without regard to its effect upon the

disestablishment of the dual system, was it proper for the court to deny injunctive relief?

Statement of the Case

Until the recent past, the public institutions of higher education maintained and operated by the State of Alabama and its agencies were racially segregated as a matter of law, policy and practice. Statutes still on the books designate institutions as being for "whites" or "Negroes." Ala. Code, Tit. 52, §§438, 455, 455(3), 466 (1958). Indeed, §10(h) of Act No. 243 (R 5), which established defendant Alabama Public School and College Authority, designates various institutions as "Negro." And as recently as 1963 a federal court was called upon to order Auburn University, the predominantly white institution whose establishment of a branch in Montgomery is challenged in this action, to admit Negroes, after findings that, apart from the two Negro institutions, all other public institutions of higher education in the State of Alabama were for whites only, by statute, custom and tradition. *Franklin* v. *Parker,* 223 F. Supp. 724 (M.D. Ala. 1963), *modified* and *aff'd.,* 331 F.2d 841 (5th Cir. 1964).[3] And in 1967 the court in *Lee* v. *Macon County Bd. of Educ.,* 267 F. Supp. 458, 474 (M.D. Ala.), *aff'd.,* 389 U.S. 215 (1967), noted that Alabama's trade schools, vocational schools and state colleges[4] "continue to

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[3] See also *Lucy* v. *Adams,* 134 F. Supp. 235 (N.D. Ala.), *aff'd.,* 228 F.2d 619 (5th Cir. 1955), *cert. denied,* 351 U.S. 931 (1956), where the court found the University of Alabama guilty of a tacit policy of excluding students from admission on the basis of race. The Negro who subsequently enrolled was expelled. And it was not until federal troops were brought in that Negroes applying in 1963 were finally allowed to register. See 8 R.R.L.R. 448-58. It is the proposed expansion of the University of Alabama's Extension Center that is the subject of this suit.

[4] The court used the term "state colleges" to refer to "all state colleges or universities except the University of Alabama, Auburn University, University of South Alabama at Mobile, and Alabama

be operated on a segregated basis . . : as if *Brown* v. *Board of Education* were inapplicable in these areas."

The court below took judicial notice of the fact that "Alabama has traditionally had a dual system of higher education," and found as a fact that "the dual system in higher education has not been fully dismantled." (App. pp. 6a-7a, *infra*). And it is indeed clear that the dual system is far from being "fully dismantled." See Apps. B, C and D, pp. 14a-18a, *infra*.[5]

Alabama State College is at present the only public, accredited, degree-granting senior college in Montgomery. It is, for all practical purposes, an all-Negro school, created as such by statute, Ala. Code, Tit. 52, §438 (1958), and perpetuated as such in fact. The record indicates that as of the fall of 1967, Alabama State had two white students and two white teachers out of a total of about 1800 students and 85 teachers (R. 834, 847-48, 693; App. D, *infra*, p. 17a). In addition there exists in Montgomery the University of Alabama Extension Center. This is a small, predominantly white, non-degree-granting institution, providing college courses, mostly given at night.

Interest in another state-supported institution of higher education in Montgomery was initially generated by the

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College at Montevallo, which institutions have separate boards of trustees and are not administered by the Alabama State Board of Education." 267 F. Supp. at 474 n. 19.

[5] It is worth noting that even those state institutions—most of the trade schools and junior colleges—created in recent years have clear racial identification in faculty and student body (R. 685-86, 721-29; App. D, pp. 17a-18a *infra*). Thus the State has not merely perpetuated, but is continuing to engender racial institutions. As a corollary it should be noted that the Alabama Education Study Commission, created by the Legislature in 1967 to study higher educational needs throughout the State and come up with a 10-year projected plan, has only white members (R. 783).

Montgomery Chamber of Commerce, an apparently all-white organization. Its Education Committee was reactivated in January, 1966, under the chairmanship of Mr. Holman Head, primarily to work in developing a new college. The Committee had no Negro member (R. 746).

As the court below found, "apparently it was assumed from the beginning that expansion of the Alabama Extension Center was the way to proceed." (App. 9a, *infra*). Officials of the predominantly white University of Alabama were first approached to see if they would be willing to undertake expansion of the Center. When the University of Alabama decided that it would not, negotiations turned to Auburn University.

Auburn University was established by statute as a white university, Ala. Code, Tit. 52, §455 (1958), and admitted its first Negro student in 1964 as a result of court action (R. 781; 60-61; *and see Franklin* v. *Parker, supra,* p. 5). In the fall of 1967, with the largest number of Negro students ever, Auburn had only 41 Negro students out of a total enrollment of about 13,000, and only three part-time Negro teachers out of a total faculty of about 800 (R. 780-782; 104-06; 60-70, App. B, p. 14a *infra*). Ultimately it was agreed that Auburn would take over the University of Alabama's Extension Center, and expand it to form a new branch of Auburn in Montgomery. The Chamber of Commerce Education Committee then met with the Montgomery legislative delegation, headed by Senator Joe Goodwyn, who introduced Act No. 403, which authorizes the Alabama Public School and College Authority to raise money for the purpose of establishing a 4-year college at Montgomery under the supervision and control of Auburn. After the bill was enacted in September, 1967, the Chamber of Commerce created a site selection committee, whose members were all white (R. 779, 234). And Auburn Uni-

versity set up a five-man committee, also all-white, to plan the educational program for its Montgomery Branch (R. 79-80), and appointed Dr. Henry Handley Funderbunk, Jr., as Vice President for Montgomery Affairs.

Alabama State College was not consulted in any stage of the planning of the new college, nor was its participation sought in any manner. The sole contact with Alabama State was a visit in February, 1967, to Dr. Levi Watkins, President of Alabama State College, to advise him as to what was happening (R. 763-64, 829-31).

Indeed, up to this present time no Negro or Negro institution has been involved *in any form* in the planning of the new institution in Montgomery, nor have any Negro groups even been consulted regarding their needs for the proposed institution (R. 753-55).

Moreover, in none of the reports, surveys, discussions, and conversations regarding the establishment of the new institution was any mention made, or thought expressed, as to the effect of the proposed institution on the dual system of education in Alabama. Indeed, the state officials involved proclaimed their complete disinterest in racial considerations.[6] And, as the court below found, "defendants apparently did not seriously evaluate Alabama State College's potential as an alternative." (App. 11a, *infra*). Alabama State College was said to have been rejected as a possibility because of the limitations of its "very basic curriculum" (R. 753), yet a small, non-degree-granting center offering primarily night school courses was chosen in its place for expansion. The failure to even consider the possibility of

[6] For example, Holman Head was asked by counsel for the Alabama Public School and College Authority whether "in any of those discussions with Senator Goodwyn or any of your reports, was there any mention of race or color in any respect?" His answer was "None whatsoever." (R. 777).

either expanding Alabama State, or establishing a program in cooperation with it, is particularly striking in view of the fact that the new institution was intended to have essentially the same kind of curriculum, with an emphasis on education, liberal arts, and business, as existed at Alabama State (R. 742-44, 818-19, 87-88; compare R. 131 with Plaintiffs' Exhibit No. 3).

Finally, there is evidence that the proposed Auburn branch was designed to serve the needs of the white students in Montgomery now commuting to institutions outside of Montgomery rather than going to the Negro Alabama State College.[7] Student recruitment efforts for the Auburn branch have been directed at white high schools to the complete exclusion of Negro high schools. During December of 1967 Dr. Robert Strong, the white Director of High School and Junior College Relations at Auburn, requested permission of various high schools in Montgomery and surrounding counties to visit them to explore senior interest in the Auburn branch. However, he neither contacted nor visited any Negro high schools.[8] Although there was some indication in the record that Negro high schools were to be visited later, it cannot possibly have been a coincidence that the white schools were visited first, and in a group. Indeed, in one day Dr. Strong made a recruiting visit to three white

[7] There was testimony at the hearing that this was Senator Goodwyn's reason for introducing the bill authorizing the new college (R. 903).

[8] See generally R. 873-899; 912-927. Dr. Strong testified that he telephoned George Washington Carver High School but was unable to reach either the principal or the guidance councellor. However, while he left a message to return the call, the message apparently made no mention of the Auburn branch; Dr. Strong did not call again; and when the guidance councellor called back to inquire what the purpose of the call was, Dr. Strong made no mention of the Auburn branch, allegedly because the legal action had intervened and "my instructions were that we would delay this until something was settled." R. 915-916.

high schools in Montgomery, two public and one private, but failed to visit the four Negro high schools in Montgomery. On Dr. Strong's only other recruiting trip for the Auburn branch he visited a white high school in Wetumka, but failed to visit the two Negro high schools in that same town; instead he visited that same day a white high school in Prattville in another county, again failing to visit the Negro high school in that town (R. 923-925).

Appellants sought in this action declaratory and injunctive relief against the operation of Act. No. 403, authorizing the creation of the Auburn branch at Montgomery.[9] In its decision announced July 26, 1968, the court below noted initially that plaintiffs' basic argument—that the duty to disestablish the dual system of education applied equally to higher education, and that that duty requires officials to utilize new construction as an opportunity to disestablish the dual system—presented a case of first impression. The court took judicial notice of the fact that Alabama had "traditionally had a dual system of higher education," and found as a fact that "the dual system . . . [had] not been fully dismantled;" and it recognized that "the law is clear also that the State is under an affirmative duty to dismantle the dual system." However, the court stated that it did not "agree that the *scope* of the duty should be extended so far in higher education as it has been in the elementary and secondary public schools area," and stated that it was "reluctant at this time to go much beyond preventing discriminatory admissions." (App. 6a-7a, *infra*). The court noted that, unlike institutions of higher education, public

[9] Originally appellants also sought relief against the operation of Act No. 243, authorizing the establishment of the Alabama Public School and College Authority, but at the beginning of the hearing on the merits of this case, plaintiffs announced that they did not "urge upon the Court at this time" their claim that Act No. 243 was unconstitutional.

elementary and secondary schools were traditionally free and compulsory, and that, prior to "freedom of choice," children were assigned to schools. The court concluded that, while in planning new construction or expansion the state legislature should consider numerous variables including *impact on the* dual system, "in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved." (App. 7a-8a, *infra*).

The court nevertheless did consider the development of the plans for the Auburn branch in Montgomery, stating that "a brief review of the background of this case will, we think, reveal the wisdom of this conclusion" (that courts should not review construction decisions). (App 8a, *infra*). The court stated that plaintiffs had not shown that the Auburn branch was designed to provide for white students only. And in answer to plaintiffs' contention that inadequate consideration was given to how the proposed Auburn branch might be operated so as to disestablish the dual system, the court stated that "it is at least as reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school, as it is to believe that Alabama State would so evolve;" and stated further that "in the discharge of the duty to maximize desegregation, the Auburn branch is at least arguably as acceptable as any alternative proffered by plaintiffs." The court conceded that "defendants apparently did not seriously evaluate Alabama State College's potential as an alternative," but noted that evidence was introduced indicating that Auburn was more appropriate for a variety of educational reasons (App. 10a-11a, *infra*).

The court concluded that, "as long as the State and a particular institution are dealing with admissions, faculty

and staff in good faith the basic requirement of the affirmative duty to dismantle the dual system on the college level . . . is satisfied." (App. 11a, *infra*).

THE QUESTIONS ARE SUBSTANTIAL

I.

The Court Below Erred in Holding That the Scope of the Affirmative Duty to Disestablish a Dual System of Education Is More Limited in the Area of Higher Education Than in the Area of Elementary and Secondary Education and, Specifically, That It Does Not Include Any Enforcible Duty to Consider Disestablishment as a Factor in the Planning of New Construction or the Expansion of Existing Facilities.

The court below clearly held that the scope of the duty to disestablish the dual system of education does not include, in the area of higher education, the requirement enforced in the areas of primary and secondary education to plan construction so as to further the disestablishment of the dual system. The court's entire discussion of the particular facts of the case was within the context of this holding (See II, *infra* pp. 22-23).

The court's opinion, in concluding that as long as admissions, faculty and staff are dealt with in good faith, the State's obligations under the equal protection clause are satisfied, in effect, although not in words, denies the existence of any duty to take affirmative steps to uproot the dual system on the higher education level, and tacitly revitalizes the destructive dictum of *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955): "The Constitution . . . does not require integration. It merely forbids discrimination."

Certainly the affirmative duty to disestablish the dual system has by now been firmly established, and the ghost of *Briggs* v. *Elliott*, *supra*, laid to rest, in the area of primary and secondary education. See, *e.g.*, *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *United States* v. *Jefferson County Board of Educ.*, 372 F.2d 836 (1966), *aff'd. en banc*, 380 F.2d 385 (5th Cir. 1967), *cert denied*, 389 U.S. 840 (1967). There appears to be no legitimate reason to limit the scope of this duty in the area of higher education although, because of differences in the systems, different methods might be appropriate in achieving integration. See *infra*, p. 17. In *Jefferson*, *supra*, the court pointed out that:

> the central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law. . . . Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. (372 F.2d at 867)

In higher education the original vice was simply establishment by law of separate white and Negro institutions; this too has resulted in the continuing operation of separate, identifiable, white and Negro institutions. The duty to disestablish this system by any available, appropriate method would seem to be equally important. Indeed, it is ironic that the lower court here should find this duty, stemming originally from *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown* I), 349 U.S. 294 (1955) (*Brown* II), of limited applicability in the field of higher education when the very forerunners of *Brown* were cases involving higher education. See *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337 (1938), *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948), *Sweatt* v. *Painter*, 339 U.S.

629 (1950), *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950). Indeed in *Frasier* v. *Board of Trustees of the University of North Carolina*, 134 F. Supp. 589, 592-93 (M.D.N.C. 1955), *aff'd.*, 350 U.S. 979 (1956), the court stated that there was nothing in *Brown* v. *Board of Education*, *supra*, "to suggest that the reasoning does not apply with equal force to colleges as to primary schools. Indeed, it is fair to say that . . . [it applies] with greater force to students of mature age in the concluding years of their formal education as they are about to engage in the serious business of adult life," citing and quoting from *Sweatt* v. *Painter*, *supra*. And in *Florida ex rel. Hawkins* v. *Board of Control*, 350 U.S. 413-14 (1956), this Court held that the "deliberate speed" rule of *Brown* II was not applicable to graduate study, because it did not present the "problems of public elementary and secondary schools," and there was therefore "no reason for delay."

Recognition of the affirmative obligation to disestablish the dual system led inevitably to the doctrine that, to the extent consistent with the proper operation of the school system, new construction and the expansion of existing facilities should be undertaken with this obligation in mind, a doctrine which is by now well-established. See, *e.g.*, *United States* v. *Jefferson County Board of Educ.*, 372 F.2d 836, 877, 900 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840, (1967).[10] *Lee* v. *Macon County Board of Education*, 267 F. Supp 458 (M.D.Ala. 1967) (3-judge court); *United States* v. *Board of Public Instruction of Polk County, Florida*, 395 F.2d 66 (5th Cir., 1968); *Kelley* v. *Altheimer*, 378 F.2d 483, 496

[10] "The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation." (372 F.2d at 990)

(8th Cir. 1967); *Brewer* v. *School Board of the City of Norfolk*, 397 F.2d 37 (4th Cir. 1968).

These cases imply no distinction between grade schools and higher education. But the court below found this new construction doctrine inapplicable to the area of higher education on the grounds that: (1) higher education, unlike primary and secondary education, is traditionally neither free nor compulsory; (2) students choose which institution of higher education they will attend while, prior to "freedom of choice," children were assigned to their primary and secondary schools; (3) higher educational institutions present a "full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and hiring arrangements . . . ," while grade schools are, in principle at least, substantially similar. The court concluded, therefore, that in reviewing a decision regarding the construction or expansion of an institution of higher education "to determine whether it maximized desegregation, we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved." (App. pp. 7a-8a, *infra*).

The court's reasoning simply does not withstand analysis. Public institutions of higher education may not be completely free, but they are still public institutions, supported and directed by the state. The fact that education is not compulsory in Alabama after the age of 16 should make efforts to further the desegregation of institutions of higher education *less* rather than *more* problematical since there is no question of forcing whites to attend schools with Negroes. In *Watson* v. *City of Memphis*, 373 U.S. 529, 532 (1963), this Court, in holding that delay in the desegregation of public parks and other municipal recreational facilities was not warranted, noted that such desegregation

did not "present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, *at which attendance is compulsory*, the adequacy of teachers and facilities crucial, and questions of geographic assignment often of major significance." (emphasis added). And the opinion noted that the need for delay in desegregation had not been extended to state colleges and universities "in which like problems were not presented." 373 U.S. at 532 n.4. See *supra*, p. 14.

The court's second point likewise has no validity. While traditionally children were assigned to their primary and secondary schools, after the decisions in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), the Southern school districts almost uniformly changed to "freedom of choice" systems, and it was within the context of "freedom of choice" that the new construction doctrine was developed. See, *e.g.*, *United States* v. *Jefferson County Board of Educ.*, *supra*, p. 14; *Lee* v. *Macon County Bd. of Educ.*, *supra*, p. 14; *United States* v. *Board of Public Instruction of Polk County, Florida*, *supra*, p. 14; *Montgomery County Bd. of Educ.* v. *Carr*, 400 F.2d 1 (5th Cir. 1968). In *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), this Court held that where freedom of choice failed to succeed in producing a unitary, non-racial system, school systems would have to abandon it in favor of zoning or some other system that promised to work better. Since, as noted below, "freedom of choice" seems an appropriate system for higher education, doctrines such as the new construction doctrine, which can be used to make freedom of choice succeed in producing a unitary, non-racial system, are of *particular* importance in the area of higher education.

The court's third reason has more colorable validity, since public institutions of higher education have traditionally been supposed to present a greater diversity

of opportunities than grade schools. This distinction would be of considerable relevance to a decision as to whether zoning ought ever be substituted for freedom of choice in the area of higher education. But it appears to have no relevance to the propriety of the new construction doctrine. The court's argument is apparently that in deciding on construction or expansion in the area of higher education, officials must, because of the greater variety in higher education, take into account a greater complex of variables than in making such decisions on the primary and secondary level. This however does not necessarily follow. There are numerous complicating factors on the primary and secondary level which don't exist on the higher education level: for example, transportation problems (since grade school systems have traditionally provided free transportation), and capacity (since grade schools must serve all eligible students, while institutions of higher education can adjust their own admission standards to suit their capacity). Moreover, even if construction and expansion decisions in the area of higher education *were* more complex, this would not justify the court's conclusion that it should therefore refuse entirely to consider whether such a decision adequately took account of the duty to disestablish the dual system of education.

Significantly, the one recent opinion[11] dealing with issues comparable to this that appellants have found, rejected

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[11] The only other comparable case plaintiffs have found is *Wynn* v. *Trustees of the Charlotte Community College System*, 122 S.E. 2d 404 (N.C.S.Ct. 1961), where the court held it was permissible for state funds to be used to build two separate colleges, noting that there was no evidence either college would exclude any student on the basis of race. The decision was not grounded on any distinction between higher and other education, but rather on the clearly outdated and invalid theory that *Brown* v. *Board of Education, supra,* did not require integration, but merely forbade the exclusion of students from the schools of their choice solely because of race.

the approach taken by the court below. In *Sanders* v. *Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968), an action was brought to prevent the University of Tennessee from constructing a new facility for expanding its evening course program at Nashville, also the location of the predominantly Negro Tennessee A & I State University; the court was also asked to order State officials to present a plan for the desegregation of the public universities of Tennessee. The court clearly held that there was "an affirmative duty . . . to dismantle the dual system of higher education which presently exists in Tennessee," and that an "open-door policy . . . alone does not discharge the affirmative duty . . . where, under the policy, there is no genuine progress toward desegregation and no genuine prospect of progress." The court therefore ordered the State defendants to submit "a plan designed to effect such desegregation of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University, as to indicate the dismantling of the dual system now existing." (288 F. Supp. at 941, 942.) Significantly, the *Sanders* court noted factors mentioned by the court below here: the fact that colleges are neither compulsory nor free, and that students are not assigned but may choose where they will attend. But the *Sanders* court found these significant only to the extent they indicated that "the simple remedies which might be available to a county school board . . . are not available here," and warranted granting the defendants "a substantial amount of time for the submission of such a plan." (288 F. Supp. at 943.) Finally, while the *Sanders* court denied injunctive relief against the proposed construction, the opinion makes it clear that this is based on the particular facts of the case, *not* on any theory that the construction doctrine is inapplicable to higher education. Indeed, the court specifically points out that, "in reaching this decision that in-

junctive relief should be denied, I have not grounded it on the recent case of *Alabama State Teachers Association* v. *Alabama Public School and College Authority* . . . , involving the construction in Montgomery, Alabama, by Auburn University, a historically white institution, of a facility completely duplicating a historically Negro public college in that city." (288 F. Supp. at 942.)

II.

The Court Below Erred in Upholding the Proposed Construction of a Branch of Auburn University in Montgomery Where the Record Shows That It was Planned Without Regard to Disestablishment of the Dual System.

The proper role of a court, in reviewing decisions regarding new construction,[12] is to ensure that the State officials responsible for planning such construction gave proper consideration to the goal of desegregation. It is for these officials, not for the court, to make the initial assessment as

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[12] It is irrelevant whether the proposed college is characterized as a new institution in Montgomery or an expansion of the already existing institution. The label is unimportant. What is important is that any major change in the character of an institution in a dual system offers a fresh opportunity to channel that change in the direction of integrating the system. There can be no serious question that the Auburn Branch is a radical departure from any institutions heretofore existing in Montgomery. The University of Alabama Extension Center is basically a night school; it does not grant degrees; it has an enrollment of 400 or 500 students; its assets consist of one building worth about $225,000, equipment and furnishings, and a library which Auburn will only rent for the interim and which will later be moved to the main campus of the University of Alabama. In sharp contrast, the new institution is to be a degree-granting, daytime institution (which will also have evening courses); it will be a multimillion dollar college on an entirely new, large campus, with an eventual enrollment of 15,000 students.

to whether planned construction will adequately satisfy the duty to disestablish the dual system. In *United States* v. *Board of Public Instruction of Polk County, Florida*, 395 F.2d 66 (5th Cir. 1968), the Fifth Circuit discussed the necessity for the initial planning for construction by such officials to be made with reference to their obligation to disestablish the dual system:

> The appellee contends that inasmuch as the planning for the school was made without reference to race, there was no conscious effort on the part of the Board to perpetuate the dual system. This does not meet the requirements of the court order. There is an affirmative duty, overriding all other considerations with respect to the locating of new schools, except where inconsistent with "proper operation of the school system as a whole," to *seek* means to eradicate the vestiges of the dual system. It is *necessary* to give consideration to the race of the students. It is clear from this record that neither the state board nor the appellee sought to carry out this affirmative obligation, before proceeding with the construction of this already planned school. (395 F.2d at 69)

Further, the court in *Polk County* emphasized that where officials plan new construction without regard to their duty to disestablish the dual system, no retroactive assessment of the affect of the plan on the dual system, by the officials or by the court, can validate it.

> The United States contends that the school cannot be built at this location until the factors relating to possible steps assisting in eradicating the former dual system are evaluated by the Board having that responsibility. This has not been done. The conclusory

> expression of opinion by the superintendent of schools that in his judgment the location of this school, long since planned, without reference to the requirements of Jefferson, would meet those requirements, cannot substitute for the absence of a planning study and analysis made in such manner as to be subject to review by the district court that is required under the *Jefferson* ruling.
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> The decision as to what is possible without adversely affecting the proper operation of the school system as a whole must be made by the Board. It should be made in such manner as would permit the district court's review of the conclusion reached in order to determine whether the requirements of the decree have been fully understood and carried out. (395 F.2d at 69-70)

See also *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 480-481, 489 (M.D. Ala. 1967); *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 877 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967); *Broussard* v. *Houston Independent School District*, 395 F.2d 817, 822, 823, 824-26 (5th Cir. 1968) (Wisdom, J., dissenting.)

It is clear from the record in this case that, in all the conversations, meetings, and gathering of information that went into planning the establishment of a new institution of higher education in Montgomery, no consideration was given to the goal of furthering desegregation. See pp. 6-10, *supra*. No effort was made to involve members of the Negro community in the planning, or to design an institution responsive to their needs. No thought was given to expanding Alabama State rather than the University Center, or to coordinating with Alabama State in any

significant way, although these would have been obvious *possibilities*, meriting at least some consideration, had there been any concern with desegregation as a goal. And no efforts were made to attract a significant Negro student population to the proposed Auburn branch. Indeed to date recruitment efforts have been directed at white high schools to the complete exclusion of Negro high schools.

The opinion of the court below does not argue, as indeed it could not, that any consideration was given by appellants to disestablishment of the dual system in planning the Auburn branch. Instead the court proceeded to make its own assessment of the impact of the construction on disestablishment and concluded that "it is certainly as reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school, as it is to believe that Alabama State would so evolve," and that "in the discharge of the duty to maximize desegregation, the Auburn branch is at least arguably as acceptable as any alternative proffered by plaintiffs." (App. 10a-11a, *infra.*) It is not clear that these statements constitute anything more than dicta, since the court noted that its review of the background of the case would "reveal the wisdom of [its] . . . conclusion" that courts ought not review construction decisions (App. p. 8a, *infra*). In any event, to the extent the court did make findings, it erred in imposing a burden on plaintiffs to prove that a particular alternative to the proposed Auburn branch would be more effective in disestablishing the dual system, and, indeed, in making any independent, retroactive assessment of the impact of the proposed plan on the dual system. Once plaintiffs had shown that in planning the proposed Auburn branch, defendants had not considered disestablishment of the dual system as a goal, the burden should have been placed on defendant offi-

cials to produce a new plan which did give adequate consideration to disestablishment. See pp. 19-21, *supra*.

Finally, even if the burden were properly placed on plaintiffs to prove that some alternative to the proposed Auburn branch would be more effective in disestablishing the dual system, we submit that this burden was satisfied. Under the proposed plan a traditionally white university was authorized to expand a traditionally white extension center to create a liberal arts college "completely duplicating a historically Negro public college in [Montgomery]," *Sanders* v. *Ellington*, 288 F. Supp. 937, 942 (M.D. Tenn. 1968). Not only would this proposed expansion fail to aid in the disestablishment of the dual system; it would perpetuate and reenforce that system, by removing presently existing economic and geographic pressures on white students in Montgomery to attend Alabama State. If instead the existing funds were used to expand and improve Alabama State, that college's capacity to attract white students would be much improved (see R. 843-44). The court below indicates that the Auburn branch would be at least as likely to become an integrated institution; but this ignores completely the fact that Alabama State would then in all likelihood remain a virtually all-Negro institution. While it is true that the development of Negro institutions of higher education into truly integrated institutions is rare,[13] it has taken place. West Virginia State College and Bluefield State College in West Virginia, and Lincoln University in Missouri are examples of historically Negro institutions which have become predominantly white.[14] Numerous other

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[13] See generally Jencks & Riesman, THE ACADEMIC REVOLUTION 469 (New York, 1968).

[14] *Id.*; McGrath, THE PREDOMINANTLY NEGRO COLLEGES AND UNIVERSITIES IN TRANSITION 12 (Institute of Higher Education, Columbia Univ., 1965).

traditionally Negro institutions of higher education have, since 1954, attracted significant numbers of white students.[15] Moreover, one of the reasons that such integration seldom does take place is because in most cities in the South where a predominantly Negro college exists, there also exists a predominantly white college and, where there does not, there is a tendency to create a new institution for the white community rather than expanding the existing Negro institution.[16]

In any event, expansion of Alabama State was not the only alternative presented for the court's consideration below. In their post-trial memorandum appellants suggested, for example, that the court might require that there be no duplication of courses being offered at Alabama State College by any new college established; or that any new college coordinate its programs in various areas with Alabama State. These and other alternatives are discussed, *infra*, pp. 26-28. What is significant here is that there were many alternatives available offering a greater likelihood of desegregation than the proposed plan.

The court below noted that at the hearing evidence was introduced showing that Auburn would be more suitable than Alabama State "because it could offer a wider range of courses, greater breadth and depth of faculty, and greater physical resources." (App. 11a, *infra*). But this does not support a conclusion that the creation of an independent, duplicative facility constitutes an appropriate decision from an educational point of view, completely apart from its effect on the dual system. McGrath, in his recent

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[15] See, *e.g.*, Clement, *The Historical Development of Higher Education for Negro Americans*, 35 J. Negro Educ. 299, 303-04 (1966). See also McGrath, *supra* n. 14, at 12.

[16] Jencks & Riesman, *supra* n. 13, at 470.

study of predominantly Negro colleges and universities, argues that the states:

> . . . ought not to maintain two systems of higher education, one for Negroes and one for other citizens. Quite aside from the legal and moral issues involved, segregation in higher education, as well as at other levels, is an economically wasteful and debilitating practice. More than others, the economically disadvantaged states where segregation is most widely practiced cannot afford to waste their limited resources as they now do in duplicating programs, facilities, libraries, and plant in two systems of higher education, one for Negroes and one for whites . . . . The maintenance of separate, segregated systems of higher education involves economic consequences which necessarily depreciate the entire educational program. (McGrath, *supra* n. 14 at 30).
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> What has been said about the waste in a duplication of services in nearby institutions applies with particular force to segregated units of the same state systems of higher education. (*Id.* at 140)

CONCLUSION

In conclusion we submit that appellants, having shown that the proposed Auburn branch was planned without any consideration to disestablishment of the dual system as a goal, are entitled to an injunction against the operation of Act No. 403, and against the construction or expansion of any higher educational facilities until such time as defendants produce for the court's approval a plan which properly takes into account the obligation to disestablish the dual system.

While it is neither necessary or appropriate at this point for this Court, or for the court below, to require any particular alternative to the proposed Auburn branch, the Court can and should require that appellants, in the course of developing a plan, seriously consider and explore the following alternatives which, we submit, offer far more promise of producing a unitary, non-racial system than the proposed Auburn branch, while at the same time avoiding wasteful duplication of public facilities for higher education in the City of Montgomery.

1. *Expansion of Alabama State College.*

As indicated *supra,* pp. 23-24, expansion of Alabama State College is at least an alternative which deserves serious consideration. Appellants should, for example, consider what affect the proposed infusion of funds would have on the ability of Alabama State to provide for the educational needs of the entire Montgomery community. In addition, appellants should consider the extent to which a change in name, an increase in white faculty members, active recruitment of students in the white community, and other similar efforts would enable Alabama State to attract an integrated student body.

2. *Development of a new college in Montgomery in coordination with the gradual phasing out of Alabama State College.*

Appellants recognize the difficulty that Negro state colleges, whose traditional functions were to provide training in teaching and the agricultural and mechanical arts, may have in developing into first-rate educational institutions, capable of attracting first-rate students.[17] To the extent that this is true in the particular instance, it offers some support for the establishment of a new institution in Mont-

[17] See generally Jencks & Riesman, *supra,* n. 13, at 428-444, 472-73; *but see* McGrath, *supra,* n. 14, at 5, for a less critical view.

gomery, designed to serve the higher educational needs of the Negro, as well as the white community, and ultimately to supplant Alabama State College.[18] Such a plan should presumably envision special remedial and compensatory programs at the new institution, as well as special recruitment efforts in the Negro community,[19] to ensure that the new institution would in fact serve the needs of the entire community, Negro as well as white.

3. *Merger of the proposed Auburn branch with Alabama State College.*[20]

Merger might well be an appropriate alternative in view of the similarity of the programs of the proposed Auburn branch and of Alabama State, and the apparent strength of many of Alabama State's programs.

Under either this or alternative No. 2, listed above, a variety of cooperative arrangements might be worked out for the transition period.[21] For example, arrangements might be worked out whereby facilities such as libraries and special equipment were shared; programs in different fields were coordinated and presented on a joint basis; courses at one institution were open to the other's students, etc.

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[18] See Jencks & Riesman, *supra*, n. 13, at 475. *But see* McGrath, *supra* n. 14, at 6.

[19] See, *e.g.*, Plaut, *Plans for Assisting Negro Students to Enter and Remain in College*, 35 J. Negro Educ. 393 (1966); Wiggins, *Dilemmas in Desegregation in Higher Education*, 35 J. Negro Educ. 430, 435-36 (1966).

[20] See McGrath, *supra* n. 14, at 6, 24; Pettigrew, *A Social Psychological View of the Predominantly Negro College*, 36 J. Negro Educ. 274, 282, 283 (1967).

[21] See generally McGrath, *supra* n. 14, at 101, 140 ff.; Branson, *Interinstitutional Programs for Promoting Equal Higher Educational Opportunities for Negroes*, 35 J. Negro Educ. 469 (1966); Patterson, *Cooperation Among the Predominantly Negro Colleges and Universities*, 35 J. Negro Educ. 477 (1966).

4. ***Development of Alabama State College and any new institution as complementary institutions with different functions.***

Such a plan might, for example, prohibit the new institution from offering the kinds of programs currently available at Alabama State; or it might provide for the development of Alabama State as an institution providing pre-college preparation and vocational training, leaving to the new institution the establishment of a broad liberal arts and professional program on the college level.

As noted above, we do not feel that this Court, or the court below, need decide *what* alternative is the appropriate one. We suggest the above simply to indicate the variety of promising alternatives that exist. And we submit, in sum, that all construction and expansion under Act No. 403 should be enjoined until defendants have seriously considered and explored these and other alternatives, and have submitted for the court's approval a plan which properly takes into account the obligation to disestablish the dual system of higher education in Alabama.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX